No. 11,147

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

COFFIN REDINGTON COMPANY
(a corporation),
Appellant,

vs.

CHESTER BOWLES, Administrator, Office of Price Administration,
Appellee.

Upon Appeal from the District Court of the United States for the Northern District of California, Southern Division.

APPELLANT'S OPENING BRIEF.

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PERNAU-WALSH PRINTING CO., SAN FRANCISCO

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JURISDICTIONAL STATEMENT.

Chester Bowles, Administrator of the Office of Price Administration, hereinafter referred to as "Administrator", filed a complaint for injunction in the District Court of the United States, Northern District of California, Southern Division, against Coffin Redington Company, a California corporation, hereinafter referred to as "Company", on August 28, 1944 (R. 2). On May 10, 1945, after trial by the court, a jury having been waived, the lower court rendered a judgment for a permanent injunction against the Company

(R. 18). Within three months after the entry of the judgment and on July 12, 1945, the Company filed its notice of appeal with the District Court (R. 20). Thereafter and on September 26, 1945, pursuant to an order extending the time therefor (R. 20), the Company filed the record on appeal with this Court (R. 126).

The District Court had jurisdiction of the action by reason of the provisions of section 205(c) of the Emergency Price Control Act of 1942, as amended (50 Appendix, U.S.C.A. 925(c)). This Court has jurisdiction of this appeal by reason of the provisions of section 128 of the Judicial Code (28 U.S.C.A. 225). The pleadings necessary to show the existence of the jurisdiction are the complaint (R. 2) and answer (R. 4).

STATEMENT OF THE CASE.

The complaint alleged, first, that the Company had sold distilled spirits at prices higher than the maximum prices permitted by Maximum Price Regulation No. 445 (hereinafter referred to as "M.P.R. 445") and second, that the Company had sold whiskey only on condition that the purchaser also buy other beverages and thereby had sold said whiskey at prices higher than the maximum prices permitted by the Regulation (R. 2). The answer denied the aforesaid allegations (R. 4).

A trial was had by the court without a jury. On April 19, 1945, the District Court ordered that an

injunction should issue against the Company (R. 12), and on May 10, 1945, filed findings of fact to the effect that the Company had, first, sold distilled spirits at prices higher than the maximum prices permitted by M.P.R. 445 and second, sold whiskey only on condition that the purchaser also buy other beverages and thereby had sold whiskey at prices higher than the maximum prices permitted by M.P.R. 445 (R. 15). The lower court concluded, as a matter of law, that the Administrator was entitled to judgment that the Company be enjoined from selling whiskey to purchasers only on condition that they also buy other beverages and from selling whiskey or other distilled spirits and wines at prices in excess of the maximum established by M.P.R. 445 (R. 16).

On May 10, 1945, the District Court rendered judgment against the Company permanently enjoining it from selling whiskey to purchasers only on condition that they also buy other beverages and from selling whiskey or other distilled spirits and wines at prices in excess of the maximum permitted by M.P.R. 445 (R. 18). This appeal is taken from that judgment.

SPECIFICATIONS OF ERROR.

First: The District Court erred in finding that the allegations contained in paragraph 4 of the complaint were true, namely, that the Company had sold distilled spirits at prices higher than the maximum prices permitted by Maximum Price Regulation No. 445 (R. 16),

for the reason that there was no evidence to support said finding.

Second: The District Court erred in finding that the allegations contained in paragraph 5 of the complaint were true, namely, that the Company had sold whiskey only on condition that the purchaser also buy other beverages and thereby had sold whiskey at prices higher than the maximum prices permitted by Maximum Price Regulation No. 445 (R. 16), for the reason that there was no evidence to support said finding.

Third: The District Court erred in concluding that the Company should be enjoined from selling whiskey to purchasers only on condition that they also buy other beverages and from selling whiskey or other distilled spirits and wines at prices in excess of those permitted by Maximum Price Regulation No. 445 (R. 16), for the reason that said conclusion of law was based upon findings of fact for which there was no evidence.

ARGUMENT.

SUMMARY.

The Company contends that there was no evidence to prove that it had sold distilled spirits at prices higher than the maximum prices permitted by M.P.R. 445 (Specification 1); that there was no evidence to prove, first, that it had sold whiskey only on condition that the purchasers also buy other beverages and, second, that it thereby had sold whiskey at prices higher than the maximum prices permitted by M.P.R.

445 (Specification 2); that therefore, the conclusion of the District Court that the Company should be enjoined was erroneous (Specification 3); and that, therefore, the judgment of the District Court was likewise erroneous, and that judgment should have been given to the Company by reason of the Administrator's failure to prove his charges.

FIRST SPECIFICATION OF ERROR: THE DISTRICT COURT ERRED IN FINDING THAT THE ALLEGATIONS CONTAINED IN PARAGRAPH 4 OF THE COMPLAINT WERE TRUE, NAMELY, THAT THE COMPANY HAD SOLD DISTILLED SPIRITS AT PRICES HIGHER THAN THE MAXIMUM PRICES PERMITTED BY MAXIMUM PRICE REGULATION NO. 445.

M.P.R. No. 445, issued pursuant to the Emergency Price Control Act of 1942 (50 Appendix, U.S.C.A. 925(c)), established maximum prices for distilled spirits.

Reference to the reporter's transcript in the lower court proceeding discloses that counsel for the Administrator stipulated in his opening statement that each separate item sold had been sold within its legal ceiling (R. 27). No evidence was thereafter introduced upon this issue. The court, in its order that an injunction should issue, recited that, "* * * There is no question of any violation of price ceilings as to the individual commodities; * * *" (R. 13).

It is clear from the foregoing that the Administrator abandoned his charge made in paragraph 4 of the complaint to the effect that the Company had sold dis-

tilled spirits at over-ceiling prices, and that the trial proceeded upon the sole charge contained in paragraph 5 of the complaint pertaining to alleged combination sales.

It follows, therefore, that there was no evidence to sustain the District Court's finding that the allegations contained in paragraph 4 of the complaint were true.

SECOND SPECIFICATION OF ERROR: THE DISTRICT COURT ERRED IN FINDING THAT THE ALLEGATIONS CONTAINED IN PARAGRAPH 5 OF THE COMPLAINT WERE TRUE, NAMELY, THAT THE COMPANY HAD SOLD WHISKEY ONLY ON CONDITION THAT THE PURCHASER ALSO BUY OTHER BEVERAGES AND THEREBY HAD SOLD WHISKEY AT PRICES HIGHER THAN THE MAXIMUM PRICES PERMITTED BY MAXIMUM PRICE REGULATION NO. 445.

Section 7.8 (b) of M.P.R. 445 prohibited the selling of distilled spirits by means of tying agreements or combination sales if the effect of same would be a sale of said distilled spirits above their legal ceilings (R. 13).

The Administrator complained of certain sales by the Company to four retailers occurring over the six-month period extending from February through July of 1944. It is our purpose to demonstrate in the following pages that *all* evidence produced at the trial, including the testimony of the four retailers in question, pointed unerringly to the conclusions, first, that the Company, in view of its prominent position in the mercantile life of the Bay Area, in view of its organi-

zational emphasis and dependency upon drug and pharmaceutical distribution as compared with liquor distribution, and in view of its host of competitors in the wholesale drug and liquor business, could not have countenanced, permitted, encouraged or participated in the alleged practice of combination sales and, second, that the Company did not in fact countenance, permit, encourage or participate in such a practice during the aforementioned period or at any other time.

Mr. Sherwood Coffin, Vice-President and General Manager, testified that the Company's business was that of wholesale drug and liquor distribution, and that the Company and its predecessors had been engaged in business in San Francisco for the last ninety-five years (R. 78). In addition to sales to the usual retail outlets, the Company served hospitals and various governmental agencies (R. 79, 104). In 1944, its gross sales exceeded nine million dollars (R. 78).

In its internal structure, the Company maintained a Drug Division and a Liquor Division (R. 79). Eighty per cent of its business was attributable to the Drug Division (R. 79). The profit ratio on drug sales was higher than that on liquor sales (R. 81). The Company was under no economic pressure to sell its available liquor supplies; it was not dependent upon the Liquor Division for its continued existence. Further, the Company, perhaps more than the other wholesale liquor distributors, could not have risked alienating its customers by questionable liquor-sales tactics, for it would thereby have jeopardized many of its sustaining drug accounts.

The liquor business was the subject of active competition. In the Bay Area during 1943 and 1944, there were approximately thirty wholesale liquor distributors offering the same lines of liquor merchandise (R. 84). Under those conditions, no retailer could actually have been forced to buy anything which he did not want; his alternative would simply have been to transfer his trade to the reputable concerns.

Illustrative of the importance which the Company attached to the maintenance of its reputation and the retention of its customers was the publication and distribution of an inter-office communication (*plaintiff's* Exhibit No. 3) by Mr. Henry J. Haaf, a Director and Vice-President. This document was dated June 22, 1944, and was issued at a time when no controversy had yet arisen (the complaint was not filed until August 28, 1944). Mr. Haaf's communication disclosed that it never had been and was not then the Company's policy to engage in combination liquor sales, regardless of the actions of competitors (R. 117-18).

In the latter part of 1942, whiskey commenced to become scarce (R. 82). In fairness to its 1700 liquor customers (R. 82-3), the Company established a plan for allocating its available supplies (R. 82, 104) on the basis of customers' dollar-purchases during the first eight months of 1942, considered to be the last normal sales period (R. 82, 84). The allocation clerk in the office of the Drug Division used this standard in filling liquor orders for drug customers (R. 104-5, 119); the salesmen in the Liquor Division were likewise guided

in computing the fair share of any of their purchasers (R. 83).

Prior to the institution of this action, the Company made all of its records available to investigators from the Office of Price Administration. From those records, numbering in the thousands, the investigators selected certain ones upon which the complaint was based. The evidence relating to those selected records is best reviewed in connection with the cases of the four retailers who allegedly were imposed upon: Mattie Parker, Nat Lasser, Edith Gelsi and A. Ferroni.

1. The alleged case of "Mattie Parker v. Coffin Redington Company".

Mattie Parker, called as a witness by the Administrator, testified that she was the owner and operator of the West Berkeley Pharmacy in Berkeley, California (R. 29), that she had purchased both drugs and liquor from the Company during the eight and one-half years in which she had been in business (R. 29, 34).

She expressed her awareness of the whiskey shortage after 1942 and her realization of the fact that, in order to retain her retail liquor trade, she would have to make available to her customers types of alcoholic beverage other than whiskey (R. 35). It was for this reason that she willingly accepted every type of liquor which could possibly be allocated to her (R. 30-1, 35).

Mrs. Parker testified that she knew that she had the privilege of returning any item or items of liquor and/or drugs which she did not want (R. 34). In proof of this knowledge, she stated that, from time to

time, she had returned various drugs (R. 34). Her statement that she had never returned any items of liquor—that she had kept all that she could obtain (R. 36), was further evidence of her need and desire for all types of alcoholic beverage.

With particular reference to her purchase of whiskey and brandy on July 25, 1944, she testified that she had wanted both items (R. 30). Concerning other purchases of whiskey, rum and tequila on March 2, 1944, May 25, 1944 and June 21, 1944, she stated that she had not refused the rum (R. 30) and that she had since ordered additional tequila (R. 31).

Mr. Haaf, responsible for the Company's distribution of drugs and liquors to drugstores, testified that during the period covered by the above mentioned purchases, salesmen had not called upon such accounts to obtain orders for liquor, but that liquor distribution had been effected directly from the office of the Drug Division by John Sheehan, the allocation clerk (R. 105). Mr. Sheehan testified that he customarily had written up liquor orders for the various druggists from lists prepared by Mr. Haaf, but that he also had taken into consideration any known likes or dislikes of particular customers (R. 119); that he had attempted to send them the items for which they had indicated a preference in the past (R. 120); that Mrs. Parker had been a valued customer (R. 120); and that all or any of the items which she had received on the previously mentioned March, May, June and July dates could have been returned for credit if she had not wanted them or any one thereof (R. 120-121). Mr. Haaf also

testified as to Mrs. Parker's privilege of returning any items not needed or wanted (R. 107) and that, although Mrs. Parker had never availed herself of that privilege as to liquor (R. 107), other druggists had done so (R. 106).

Herman Duffy, the salesman who had called upon Mrs. Parker for the last seven years for drug orders, testified that at no time had she ever made any complaint to him concerning liquor which she had received from the Company (R. 123). Mr. Haaf confirmed this by stating that he had never received any complaints, oral or written, from Mrs. Parker (R. 107).

The foregoing manifests the objective, mechanical process employed by the Drug Division in parcelling out its meager supply of liquor to its drugstore customers, a process designed, not so much to return a profit on liquor sales, but to enable the druggists to retain their liquor customers and to enable the Drug Division to retain those druggists as purchasers of pharmaceutical preparations. The gesture was intended as a helpful one (R. 105) and as a deterrent to the druggist to shift his drug business to competitors (R. 107).

We submit that the alleged case of "Mattie Parker v. Coffin Redington Company" was without merit; that there was no evidence of any nature tending to prove that Mrs. Parker was at any time compelled or forced by the Company to purchase one or more items of merchandise in order to obtain others.

2. The alleged case of "Nat Lasser v. Coffin Redington Company".

Nat Lasser, called as a witness by the Administrator, testified that he was the Manager of Carlo's Wine & Liquor Store at 2080 Chestnut Street, San Francisco (R. 53), and that he had done business with the Company for the past two and one-half years (R. 57).

The witness described the customary way in which he had ordered his merchandise from the Company's salesman: the latter would make known to Mr. Lasser the merchandise available for sale; Mr. Lasser would make his selection; the salesman, in Mr. Lasser's presence, would write up the order, after which Mr. Lasser would sign it (R. 51). This purchaser testified that he had never received any merchandise which he had not ordered (R. 54).

Mr. Lasser recalled having made a purchase from the Company in June of 1944 consisting of whiskies, brandy and rum (R. 54). He stated that he had ordered all of those items (R. 55), that he had not been required to buy the rum (R. 60), and that since that time he had ordered a great many more cases of the same kind of rum, all of which had been sold (R. 59). As a matter of fact, with reference to this particular purchase of rum (two cases), Mr. Lasser testified that he had originally ordered three cases, that he had telephoned Morris Levy, the salesman, the next day and informed him that another distributor had sent him a case of rum and that he would only need two cases from the Company, and that the salesman had thereupon reduced the order to two cases (R. 60).

Mr. Levy confirmed these statements (R. 97-8). This may be cited as a typical example of the efforts of the salesmen to preserve the good will of their customers.

Mr. Lasser also recalled having given an order to Mr. Levy in February of 1944 (R. 58). This order had consisted of but a *single* item, one case of Olympic filets of anchovies (R. 58). The witness stated that he had ordered the anchovies (R. 55), that he had signed his name to the order (R. 57), that the anchovies had been merchantable goods, salable in the same manner as olives, cherries and other delicacies which naturally accompanied liquor (R. 59), and that he had sold all but the one can which the investigator from the Office of Price Administration had seized and which Mr. Lasser wanted returned (R. 55). He concluded with the statement that he had never had any complaint about the way the Company had done business (R. 60). Entirely aside from this positive evidence that Mr. Lasser had not been compelled to purchase anchovies in order to obtain other merchandise, it is significant that no other items had been ordered or received by Mr. Lasser with the anchovy purchase; a combination sale, by virtue of its manifold nature, would have been a legal impossibility.

Mr. Levy testified that at no time had he ever conditioned a sale of whiskey upon a sale of other merchandise (R. 97).

We submit that there was no evidence of any nature tending to prove that Nat Lasser was at any time compelled or forced by the Company to purchase one or more items of merchandise in order to obtain others.

3. **The alleged case of "Edith Gelsi v. Coffin Redington Company".**

Edith Gelsi, called as a witness by the Administrator, testified that she owned and operated a tavern in Daly City (R. 47); that she had been in business for the last nine years (R. 47) and had been a customer of the Company during that entire period (R. 50).

Mrs. Gelsi stated that the Company had always given her satisfactory service and that it had never forced her to take anything (R. 51).

With particular reference to a purchase in June of 1944 (R. 47), consisting of whiskey, sloe gin, rum, brandy and anchovies (R. 52), she stated that she had voluntarily purchased all of those items (R. 51), that she had never objected to or returned any of them (R. 53), and that she had been selling such merchandise ever since she had been in business (R. 53). Concerning the anchovies in particular, Mrs. Gelsi testified that she had wanted them, that her husband had signed the order, that she and her husband had used them, and that only two small cans (2 oz. size) were left (R. 52). Mr. Edwin Schloss, Manager of the Liquor Division, testified that the anchovies had been imported from Portugal in pure olive oil, that they had been difficult to obtain and had been restricted by the Company (R. 85).

Peter Guito, salesman, testified that his method of selling had been to inform Mr. Gelsi of his available supply and to sell him the items which the buyer had wanted (R. 101). There had been times when Mr. Gelsi had asked for certain items which had not been

available, and the salesman had made notations of the desired merchandise and later, when it had become available, had so advised Mr. Gelsi (R. 101).

With reference to the sale made in June of 1944, the salesman stated that Mr. Gelsi had been trying to obtain the Bacardi rum for several months prior to the date of sale (R. 101), and that he had been pleased to receive the rum when it had finally been sold and delivered to him (R. 102). Mr. Gelsi had good reason to be pleased: all rum had been difficult to obtain, particularly Bacardi rum (R. 87).

Mr. Guito, in answer to the direct question, "Did you ever sell to Mr. Gelsi or Mrs. Gelsi whiskey on condition that they would purchase rum, tequila, gin or any of the other items?", responded with a categorical, "No" (R. 102).

We submit that there was no evidence of any nature tending to prove that Edith Gelsi or her husband was at any time compelled or forced by the Company to purchase one or more items of merchandise in order to obtain others.

4. The alleged case of "A. Ferroni v. Coffin Redington Company".

Mr. Ferroni, called as a witness by the Administrator, testified that he was the operator of a restaurant known as "Transport Cafe", located at 1901 Union Street, San Francisco, and that he had been in business for the last fourteen years (R. 36).

The witness stated that he had ordered whiskey from the Company within the last year (R. 37). He denied

that he had ever been told that he could not buy whiskey without also buying other liquor (R. 37). He testified affirmatively that the Company's salesman had not required him to buy anything: "I will tell you, they don't force me to buy anything" (R. 38); "* * * it is a fact that they never forced me to buy something I did not need; for the last three years I didn't do that at any time" (R. 38-9).

Concerning purchases which he had made on May 27 and July 11, 1944, in response to a question by counsel for plaintiff as to whether or not he had ordered the rum, he stated that he had (R. 39-40). With reference to purchases made on June 29, 1944, he likewise testified that he had ordered the rum and sloe gin (R. 40). Concerning purchases made on June 14 and 27, 1944, he also testified that he had ordered the brandy and anisette (R. 40).

It developed that Mr. Ferroni customarily had done a large neighborhood business in coffee royals (R. 43, 95), that is, coffee containing whiskey, rum, brandy or anisette; that sometimes forty or fifty customers a night had entered his restaurant and had ordered nothing but coffee royals (R. 43); that he had used brandy (R. 43), tequila (R. 43) or anisette (R. 40) in filling their orders.

Mr. Ferroni testified that he had signed all of the orders mentioned above (R. 41) and that he had received and used in his business all of the items so ordered (R. 42).

The witness stated that at different times around the middle of 1944, he had given orders for whiskey

alone (R. 43); that, on August 9, 1944, the Company had sold him fifteen cases of whiskey and that no other items of merchandise had been included in the order (R. 43-4, 46); that there had been other occasions on which the Company had sold him only whiskey and all that he had wanted of it (R. 44).

Mr. Morris Levy, the salesman who regularly had called upon Mr. Ferroni for orders, described in detail his exact method of taking those orders: he would suggest various articles which he had for sale for the particular month, including whiskey, and would ask him what he could use; the buyer would state his needs, the salesman would make up the order in his presence, and the buyer would sign it (R. 95).

Mr. Levy further testified that, during the period from February to July, 1944, whiskey had been very scarce (R. 95) and that Mr. Ferroni had quite willingly purchased articles other than whiskey, such as rum, brandy and tequila, due to his large trade in coffee royals, particularly with the foreign element; that Mr. Ferroni had sold those articles daily and that he had repeated the orders for them from time to time (R. 96). Mr. Levy recalled one instance in which the purchaser had wanted brandy and anisette (which he had not been able to obtain for a long time)—wanted them because his Italian customers had liked and used them in quantity (R. 96).

In answer to the question, "Did you at any time, Mr. Levy, ever require Mr. Ferroni to purchase any articles in order to get whiskey?", Mr. Levy replied, "I

never have. Having been in the retail business myself, for better than 25 years, I always made it a policy to treat my customers the same as I would like to be treated, myself, and not force them at any time, to take anything. * * *'' (R. 96).

We submit that there was no evidence of any nature tending to prove that A. Ferroni was at any time compelled or forced by the Company to purchase one or more items of merchandise in order to obtain others.

All of the evidence produced at the trial has now been reviewed in the foregoing pages. That evidence shows that during the war-torn years of 1942, 1943 and 1944, the normal equation of supply and demand in the liquor industry became and remained unbalanced. Military requirements for alcohol created severe shortages in consumer intoxicants. Public insistence upon stimulants, the result of mental and physical pressures engendered by extended work weeks coupled with abundant purchasing power, soared to unprecedented heights.

It was the retailer who first felt the effects of the disturbed economic equilibrium. He was called upon to satisfy the demands of a million voices for liquor, whether it be scotch, bourbon, rye, brandy, gin, rum, tequila or anisette. Whiskey, of course, was the most sought-after variety, but when the whiskey supplies were exhausted, anything else likely to produce the same results was acceptable.

Repercussions commenced to be felt in the wholesale field. Guided by the same motive as the Office of Price Administration in rationing the food supply of America among the countries of the world, namely, to assure a little of everything to everyone, the wholesalers buckled down to the task of allocating their fast-diminishing stocks of liquor to all of their retailers. Had it not been for this equitable procedure, thousands of liquor retailers would have been compelled to close their doors (R. 90).

Perhaps there may be some who will say that, under the conditions described, competition among wholesalers could never have existed and that, therefore, such competition could have exercised no effect upon methods of sale. This, however, would be an erroneous deduction of logic as well as a misstatement of actual conditions. Even among wholesalers who dealt solely in liquor, there was the ever-present consideration in the minds of management that normal times would eventually return, that when they did, the wholesaler would again be required to *sell* his whiskey, his rum, and his innumerable other liquor products, and that the wholesaler who had disadvantaged his retailers would lose them to others who had dealt fairly. Not only was the Company conscious of this future threat to its successful operations, but it was very much aware of the existing, unabated competition in the drug business (R. 107). Without sources of distribution for its tremendous supplies of drugs, the Company would have little relative reason for continuing in business. Competition still thrived in the wholesale

drug and liquor business in the years 1942 through 1944, and this competition was sufficient to deter thinking wholesalers from disregarding it in formulating their sales plans.

As would be expected of a concern which had conducted itself successfully and with propriety in San Francisco for almost a century and which desired to continue indefinitely in the same manner, the Company operated upon the studied policy of attempting to supply all reasonable demands. This required the allocation of all items of merchandise sold to the testifying retailers (R. 86). Many sales of whiskey alone were made during the period in question (February through July, 1944) (R. 89).

The retailers selected by the Administrator to prove the charges made in paragraph 5 of his complaint numbered four. If he had chosen to call the other 1696 retailers serviced by the Company, the evidence would have been the same, but it would have been merely cumulative. Those retailers who took the witness stand testified to the truth: when they purchased their merchandise from the Company, they were not forced to buy one item in order to obtain another; they knew that they could return all items or any one thereof, just as they could have done in normal times and just as some of them did do in 1944 (R. 85-6); they knew that they could dispose of everything they bought; they *did* dispose of everything they bought.

We feel that it is highly significant that much of the testimony negativing the alleged combination sales was

elicited by plaintiff from his own witnesses, who so testified on direct examination. Additional corroborative evidence was furnished by the Company's witnesses.

A decision upon the same law and substantially the same facts as the case at bar may be found in *Bowles v. Stafford,* 56 F. Supp. 976 (District Court, Louisiana, September 25, 1944). The court there denied the preliminary injunction sought by the Price Administrator. For this Court's ready reference, the opinion in that case has been printed in the Appendix.

We rest with the statement that there was no evidence to prove the existence of a single combination sale, and that there was abundant evidence to prove the *non-existence* of such a sale.

THIRD SPECIFICATION OF ERROR: THE DISTRICT COURT ERRED IN CONCLUDING THAT THE COMPANY SHOULD BE ENJOINED FROM SELLING WHISKEY TO PURCHASERS ONLY ON CONDITION THAT THEY ALSO BUY OTHER BEVERAGES AND FROM SELLING WHISKEY OR OTHER DISTILLED SPIRITS AND WINES AT PRICES IN EXCESS OF THOSE PERMITTED BY MAXIMUM PRICE REGULATION NO. 445.

If this Court shall determine that the Company is correct in its position with reference to its First and Second Specifications of Error, it will follow that this Third Specification is also well taken. Conclusions of law fall when the supporting findings of fact are reversed:

Schenkel v. Schenkel, 238 App. Div. 878, 263 N.Y.S. 16.

Conclusions of law must find support in and arise out of findings of fact:

French v. Edwards, 21 Wall. 147, 22 L. Ed. 534;
Corpus Juris, Trial, Section 1101.

CONCLUSION.

Under the pleadings, the burden of proof was upon the Administrator to prove the violations alleged in paragraphs 4 and 5 of the complaint:

Bowles v. Cohn, 57 F. Supp. 306 at 307.

The entire record of the proceedings in the District Court, which includes every shred of evidence which the Administrator was able to produce, is now before this Court. Upon the basis of that record, we contend that the Administrator has failed, completely and without exception, to maintain his burden of proof.

Rule 52(a) of the Federal Rules of Civil Procedure provides that findings of fact of the District Court may be set aside by this Court if they are clearly erroneous. The rule plainly contemplates a review by this Court of the sufficiency of the evidence to sustain the findings:

State Farm Mut. Automobile Ins. Co. v. Bonnacci, 111 Fed. (2d) 412 at 415.

This Court is not limited to the mere question whether there is any substantial evidence to support the findings, but such findings may be set aside if they are against the clear weight of the evidence:

State Farm Mut. Automobile Ins. Co. v. Bonnacci, supra;

Aetna Life Ins. Co. v. Kepler, 116 Fed. (2d) 1 at 4, 5.

If a finding of fact is against the clear weight of the evidence, even though it is supported by some evidence, it is clearly erroneous:

Fleming v. Palmer, 123 Fed. (2d) 749 at 751;

Shultz v. Manufacturers & Traders Trust Co., 128 Fed. (2d) 889 at 900.

The Company is challenging the District Court's findings of fact as to the verity of the allegations contained in paragraphs 4 and 5 of the complaint. It believes and alleges, not only that each challenged finding was against the clear weight of the evidence, but that neither of said findings was supported by *any* evidence.

An incorrect conclusion of law qualifies as a "clearly erroneous" finding which the reviewing court may correct under Rule 52 (a):

Kuhn v. Princess Lida of Thurn & Taxis, 119 Fed. (2d) 704 at 706.

The Company respectfully asks this Court to reverse the judgment of the District Court and to render final judgment in its favor.

Dated, San Francisco, California,
November 30, 1945.

LOUIS S. BEEDY,
JOHN BENNETT KING,
THOMAS, BEEDY, NELSON & KING,
Attorneys for Appellant.

(Appendix Follows.)

Appendix.

Appendix

The opinion in *Bowles v. Stafford,* 56 F. Supp. 976 (District Court, Louisiana, September 25, 1944), follows:

"The Price Administrator seeks to enjoin preliminarily the defendant 'from directly or indirectly violating the terms and provisions of Maximum Price Regulation No. 445'.

"The complaint alleges three instances (counts) when the defendants sold commodities 'through tying-in agreements or combination sales'. The purchasers of goods in each of the counts were present in court and testified. All of the witnesses in this case for plaintiff and defendant, except one for the defendant, are persons known well and intimately by the court for many years.

"The first theory of the government in all of the three sales is, for instance in count 1, that because on one day and listed in one invoice there was a sale of two cases of rum, two cases of gin (fifths), and eight cases of gin (pints), the purchase of the rum was 'required' by the seller and that, circumstantially at least, there is evidence of a tying-in sale.

"In the second count, the same circumstantial inference is suggested when two cases of rum appear similarly with five cases of gin at one and the same time, to be followed later by another invoice, supposedly connected (the two invoices being one transaction), showing the sale of two cases of gin within thirty cases of whiskey, the tying-in being allegedly the two cases of Pete Hagen gin and the two cases of rum being sold as a condition to get

the five cases of Private Stock gin and the thirty cases of whiskey.

"In the third count, there is sold by the defendant and placed on one invoice one case (fifths) of Galgo rum and two cases (fifths) of whiskey, and four cases (half-pints) of Ron Donna rum, and that the case of rum was a condition for the sale of the other two items on the invoice is alleged, and that this was a tying-in requirement prohibited by law. The buyer testified in this case, and said there was absolutely no requirement by the seller and that the purchase was made by him voluntarily, under no suasion or compulsion.

"The presumption prevailing throughout this case is that whiskey, straight or blended, is a best seller, that rum is not a good seller, and that gin and wine are somewhat in-between.

"It developed during the course of the trial, and it was accepted mutually as a fact that there is not enough whiskey to satisfy the desire of the public for intoxicants; that beyond the whiskey there is general demand and sale of rum, wine, liqueurs, etc.

"We know the defendant company and its immediate predecessors have been engaged in the liquor business for nearly fifty years, and, though it be engaged in a business which is heavily taxed and highly policed, we have never known of a complaint filed against it in court.

"The defendant company's contention is that being engaged in the general liquor business and having a full and complete stock, through its salesmen, following well-established American business methods, it tries to sell any and all types

of its stock; that long before the establishment of the O.P.A. it had weekly meetings of its salesmen for the discussion of what was in stock and what should and could be legitimately offered the buying public, etc.; that it has never made a condition to a single one of its clients that in order to get a certain quantity of whiskey there had to be bought a certain quantity of wine or rum or any other type of intoxicant.

"The plaintiff offered evidence of other sales by the defendant, in addition to the sales included in the three counts, to show general intent or conduct. The court permitted this evidence over objection of defendant because the main evidence was equivocal, in that, for instance, where there appears a sale of rum and whiskey on the same invoice and on the same date, the government alleges the rum had to be taken by the buyer in order to get the whiskey, while on the other hand the defendant says it is merely a sale of rum and whiskey, one item sold independently of the other, and that it is a sale in the ordinary run of its business, and that there is nothing in the O.P.A. regulations that prevents a buyer from buying two items at one and the same time. There were two witnesses of this type and one testified that he is a very busy man, having a drug store, furniture store, saloon, etc., to manage, that what would happen was that the defendant's representative would walk into his place and he (the witness) would go to him and say, 'what do you have today?' the other would mention two or three items and that he would then take it or not take it. Generally, since business was good, he would say, 'All right, send me the goods. How much do I

owe you for the last sale?' He would give his check and that was the end of the whole interview. This witness ended his testimony by saying that at no time did it ever arise that he was refused the sale of whiskey when he did not take some other item, and particularly stated that he had never been required, induced or compelled to make any tying-in purchase. The other witness, giving evidence of the same character, absolutely failed to help plaintiff's case. We are satisfied that when he said he had been promised ten cases of whiskey if he bought ten cases of wine, he was mistaken. An invoice establishes a sale of ten cases of wine and one case of whiskey. The witness claims that defendant subsequently failed to deliver the nine cases of whiskey. Irrefutable proof comes from the salesman of defendant that this witness of plaintiff was plainly mistaken. We believe the salesman of defendant.

"The manager of the buying store in counts 1 and 2 testified in person. He frankly stated that the quantity of whiskey to be had was limited, and had to be rationed, that is, apportioned by the wholesaler; that every liquor dealer knows that; that he was never compelled directly or indirectly to make a purchase, one item being included because of another; that he carried a general store of intoxicating liquors; that in one of the counts the first sale made was for only twenty cases of whiskey, but that later he telephoned and had ten more cases added; that under the general conditions of rationing, particularly as to whiskey, and the demand for it exceeding the supply, dealers had to carry many other items of intoxicating liquor, which he always tried to push because he

was never in any trouble in moving his whiskey; that the sale of whiskey alone could not keep him in business, either himself, the dealer, or the wholesaler; that the defendant was kind enough at one time in the past, and this was quite before the injunction suit of the plaintiff, to accept the return of some $1800 to $1900 worth of various goods in which he had overstocked.

"The manager of the liquor business of the defendant gave a full and detailed explanation of what was done in the regulation of its annual two-million-dollar liquor business. It apportioned its whiskey as received to its former buyers in the ratio of previous purchases, irrespective of whether or not anything else was bought. He explained that the defendant had alweys sold for many years other items and continued to do so since O.P.A., but that there were never any tying-in sales suggested, sought or planned; in fact, that they were particularly prohibited by the management.

"Two salesmen of the defendant testified in detail about the sales in the three counts. (There is a fourth count in the complaint, but, because the main witness as to it is now in the armed services and not available, this charge was not pressed.) From their testimony we believe no requirement, suasive or compulsory, was exercised in the making of the specific sales. Generally, they testified that they would reasonably try to sell all they could, yet were always mindful that a customer is never retained if you sell to him a shelf-warmer, or overstock him on an item.

"It has been proved in the case that there are a number of local wholesalers, and even since the O.P.A. regulations there is competition among them, all having salesmen seeking business. As a consequence, there could be no real or continued holding up or compulsion by any wholesaler in the establishment of what is known as tying-in sales. If the rum is bought in order to get some whiskey, as a practical necessity, the price of the whiskey when sold would have to include also the cost of the rum. The proof has prevailed in this case—the court establishing it from the first witness and subsequently the plaintiff staying away from further proof, that neither the whiskey nor the rum was sold above the ceiling price.

"The circumstance that the ratio of supposedly undesired items to the much-sought whiskey or beer is always very low tends to prove no tying-in requirement, but more likely shows but the natural, uninfluenced, relation of sales between the two.

"Another strong point with the court which favors the defendant is that it filed and placed of record all of the business it had done with the two firms involved in the three counts, for the period of January until now, and an examination of these invoices shows a great variety of items, singly and joined.

"Additionally, many of the invoices prove many sales were solely of much-sought articles, as follows: * * * (Here follows lengthy enumeration of items listed on the invoices.)

"We have now covered the total business from January to date between the defendant and Rey-

naud and Moreau, one of the dealers concerned in one of the counts, the third one. Our conclusion from these facts, showing such a variety of purchases, and in so many instances purchases of much-sought whiskey solely, is that there is no preponderance of proof to support the third count.

"We have made an examination similarly of all the sales as to the other dealer concerned in counts 1 and 2, finding that they are about equal in number and that the same factual situation exists. Consequently, we reach the same conclusion.

"We have determined that in the sole decision cited to us, United States v. Armour & Co., D.C., 50 F.Supp. 347, the court there mainly determined that the indictment filed against the defendant, containing the exact language of the law and giving the fact that as a condition of the sale of butter eggs had to be bought, legally defined a crime. No actual trial is yet reached in the cited case; we are satisfied that in the instant case the complaint properly and legally sets out the grounds for the issuance of a preliminary injunction. We do not believe that the facts in the instant case preponderate in favor of the plaintiff to warrant us in granting the issuance of the writ sought.

"We recognize, too, that general interpretations by the Administrator have great force and in the decision of this case we have recognized and given full weight to the interpretation of tying agreements (a) and (b). General Application, O.P.A. Service 2-10, page 2-812.

"This type of case is difficult of proof by the Administrator. No ceiling price is violated in this

case. The violation of a ceiling price case is immediately determinable—one or two reliable witnesses give proof as to the price actually paid and if that price be above the ceiling price, the conviction necessarily follows. With the present case the proof is much the more difficult. What would be a normal business is all we find here. With the facts before us, to characterize the three complaints as violations of the law by the defendant would do violence to our judicial conscience.

"It is not only that the evidence does not preponderate in favor of the plaintiff, but there is a want of sufficient proof to establish that degree of legal certainty necessary for judgment.

"The preliminary injunction will not be granted. Timely judgment will be signed."